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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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MOTION TO DISMISS

Pursuant to *Rule* 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

BRIEF IN SUPPORT OF MOTION

PRELIMINARY STATEMENT

This appeal is before the Court for the second time. On November 18, 1975, the Supreme Court of New Jersey issued its decision sustaining the constitutionality of New Jersey's statutory prohibition (L. 1973, c. 363) against the disposal within New Jersey of waste originating out of state. *Hackensack Meadowlands v. Municipal Landfill Auth.*, 68 N.J. 451, 348 A.2d 505 (App. 27-53). A notice of appeal and jurisdictional statement were filed by the appellants, and the State of New Jersey filed a motion to dismiss for lack of a substantial federal question. However, the Court noted probable jurisdiction on April 5, 1976. 425 U.S. 910. Oral argument was held on November 3, 1976, and on February 23, 1977 the Court remanded the matter to the Supreme Court of New Jersey for reconsideration in light of the then recently enacted Resource Conservation and Recovery Act of 1976. Pub. Law 94-580, 42 U.S.C. §6901, *et seq.* *Philadelphia v. New Jersey*, 430 U.S. 141 (1977) (App. 54-56). The appeal was reheard by the Supreme Court of New Jersey on May 10, 1977 on an accelerated basis and on June 20, 1977 that court issued its decision holding that the New Jersey legislation was not incompatible with the Resource Conservation and Recovery Act. *Philadelphia v. New Jersey*, 73 N.J. 562, 376 A.2d 888 (1977) (App. 57-69). A new notice of appeal and jurisdictional statement now have been filed.

The arguments for dismissal of this appeal for lack of a substantial federal question were appropriately set forth in the brief in support of the motion to dismiss the initial appeal. However, the State is mindful of the fact that the Court previously has noted probable jurisdiction and, after full briefing by both parties and oral argument, it remanded the matter to the Supreme Court

of New Jersey for consideration of a new issue without any suggestion that jurisdiction had been improvidently noted. Therefore, by letter dated September 26, 1977, the Attorney General of New Jersey advised the Clerk of the Court that the State did not desire to repeat the arguments contained in its previous motion to dismiss and that pursuant to *Rule* 16(3) it would expressly waive the right to file a new motion to dismiss. However, by letter dated October 17, 1977, the Clerk of the Court advised the Attorney General that the Court had requested a new response to be filed. Accordingly, the Attorney General submits herewith a motion to dismiss appropriate for reconsideration of the prior order noting probable jurisdiction.

QUESTIONS PRESENTED

1. Does the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution require a state acting to fulfill its obligation to provide solid waste disposal facilities for its own residents also to provide such facilities for other states?

2. Did Congress in enacting the Resource Conservation and Recovery Act of 1976 intend to pre-empt state legislation prohibiting the disposal within its boundaries of waste originating out of state?

COUNTER-STATEMENT OF THE CASE

On January 2, 1974, the Governor of New Jersey signed into law chapter 363 of the Laws of 1973, which was to become effective on February 1, 1974 (App. at 70-71). This legislation contained an express finding that:

> ". . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal

of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9 App. at 78).

Based on this finding the New Jersey Legislature directed that:

"No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [Commissioner of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State." N.J.S.A. 13:1I-10 (App. at 70-71).

The crisis in solid waste disposal in New Jersey leading to the enactment of the ban on the dumping of waste originating out of state was cogently described in a report submitted to the trial court, entitled "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management":

"Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating.

• • •

"There are some 340 landfills now disposing of solid waste in New Jersey, and almost all were in existence at the time the Solid Waste Management Act (1970) became effective. Most of these operations are situated on lands once considered 'marginal.' Tidal lands, floodplains, and abandoned sand and gravel mines have been favored as locations for disposing of our wastes because such lands were inexpensive, and it was felt that sanitary landfill was a suitable method of reclaiming those lands. While it is possible to bring these areas up to a more useful grade through sanitary landfill, little consideration has been given to the wisdom of doing so.

• • •

"Sanitary landfills produce leachate when water infiltrates the fill. More than half of our wastes consist of paper or other absorptive materials. A sanitary landfill is frequently likened to a sponge because of this ability to absorb and hold liquids. Yet, like the sponge, the absorptive capacity of a sanitary landfill is finite. Water is introduced into the fill through a variety of mechanisms. Natural rainwater percolation, off-site drainage into the fill, natural fluctuations

in the groundwater level, tidal influences, and the water produced through the decomposition of the organic wastes themselves all are absorbed by the landfill 'sponge.'

"Eventually, the landfill becomes saturated, and can absorb no more liquid. At that point, each ounce of liquid introduced to the fill causes a corresponding ounce of leachate to be displaced and leave the fill. Leachate produced in a sanitary landfill is a highly polluted liquid characteristic of the waste in which it was produced. Leachates from municipal wastes (household and commercial wastes) are typically 50 to 100 times as polluting as raw sewage, and landfills have been known to leach for as long as 20 years, although contaminant concentrations can be expected to decrease in time.

* * *

"Gas is produced in sanitary landfills as a product of the decomposition process. During the early stages of decomposition, air is present in the fill and the decomposition process is therefore called 'aerobic.' The principal gas produced during aerobic decomposition is carbon dioxide (CO_2).

"As the oxygen in the fill is consumed to produce CO_2, the decomposition process becomes increasingly anaerobic (the absence of air). The gaseous products of anaerobic decomposition are CO_2 and methane (CH_4). In the latter stages of decomposition almost half the gas present is methane. Methane is the 'natural gas' commonly used for cooking and heating in our homes, and is explosive when present in air at concentrations between 5 and 15 percent. Since methane is only produced in landfills where there is

no oxygen present, it does not pose an explosive threat in the fill itself.

Methane is, however, much lighter than air and, therefore, tends to migrate upward in a sanitary landfill. The gases in the landfill are normally under a slight pressure, and the methane would therefore travel from the fill along the path of least resistance, sometimes moving laterally where it cannot easily vent to the atmosphere. For this reason, methane can constitute an explosion hazard if it is allowed to accumulate in enclosed structures on or near a sanitary landfill.

* * *

"In 1971, at least 1½ million tons of solid waste generated outside of New Jersey were buried within this State. The failure on the part of our neighboring states to provide suitable disposal facilities of their own has consumed thousands of landfill acres in New Jersey, has contributed to the degradation of our environment, and is increasing the cost of disposal for our own municipalities. The depletion of landfill space and the enforcement of stringent air quality standards in the metropolitan regions of our neighboring states is increasing the volume of out-of-state waste disposed of in New Jersey at an ever-increasing rate.

"It is estimated that our metropolitan counties of Bergen, Essex, Hudson, Passaic and Union have no more than three years of landfill space remaining. In an effort to slow down the landfill depletion process, the Department of Environmental Protection, in conjunction with the Hackensack Meadowlands Development Commission, recently instituted a ban on the disposal of out-of-state waste within the Hackensack Meadowlands Development Commission district. The Hackensack Meadowlands ban caused collectors of out-of-state waste to travel into the suburban re-

gions of the state, thus threatening the life expectancy of those disposal sites. This increased the cost of solid waste collection and disposal for New Jersey's residents, for when nearby disposal sites are depleted, collectors must haul their waste longer and longer distances into the State's suburbs and rural areas.

"Since the Solid Waste Management Act took effect in 1970, over forty landfill sites have closed. During that same period only nine new disposal sites have commenced operations and, of these, only three accept general municipal-type wastes for disposal. Concurrently, more and more landfill operations are discovering that their acreage includes unusable flood plain or tidal marsh areas and original estimates of their waste capacity were erroneously high. The lands now utilized for sanitary landfills are limited, and both industry and local government have expressed concern over the scarcity of suitable new sites," (Da37-44).*

The primary cause of any problems the City of Philadelphia may encounter in disposing of its waste within Pennsylvania is not the lack of facilities in that State but rather the exclusionary ordinances of surrounding communities in Pennsylvania. As stated by David Damaiano, Commissioner of Streets of Philadelphia:

> Sanitary landfills in Pennsylvania are not public utilities. The Pennsylvania Department of Environmental Resources has been legislatively empowered to regulate such facilities, but cannot compel same to accept solid waste from any source whatever." (Pa152).**

* This notation refers to the appendix to the State's original brief filed with the Supreme Court of New Jersey, which was certified to the Court on February 9, 1976.

** This notation refers to the appendix to the appellants' application for stay.

ARGUMENT

The appellants have not presented any substantial federal question entitling them to appeal.

A. *The Commerce Clause Of The United States Constitution Does Not Prohibit A State From Taking Action To Prevent The Disposal Within Its Boundaries Of Substances Originating Out Of State Which Are Harmful To Public Health And The Environment.*

The question presented, simply stated, is whether a state may, consistent with the Commerce Clause, seek to deal with a solid waste disposal crisis of substantial proportions by prohibiting the dumping of waste originating outside the state.

The nature of the crisis was stated in emphatic terms by the New Jersey Legislature and the Supreme Court of New Jersey. Section 1 of chapter 363 states:

> "The Legislature finds and determines that since the enactment of P.L. 1973, c. 39 (C. 13:1I-1 et seq.) the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate landfill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited." (App. 70).

Similarly, the Supreme Court of New Jersey, referring to its own findings in prior litigation involving solid waste problems as well as taking judicial notice of legislative studies, stated:

> "The Court is acutely aware of the solid waste disposal problem which now exists in the State of New Jersey. Very recently we recognized that it had reached 'crisis proportions' due to the increasing scarcity of sites for dumping and landfill. *Southern Ocean Landfill, Inc.* v. *Mayor and Council of the Township of Ocean*, 64 N.J. 190, 193, 314 A.2d 65 (1974).
>
> • • •
>
> "Compounding the shortage problem are other extremely important environmental considerations. Many existing landfills within the State are located within ecologically sensitive areas, such as floodplains and wetlands, or on State-owned public trust tidelands. The operation of landfills now located in these areas may have to be limited or discontinued. An example of this is the action taken by HMDC in preserving some 1,500 acres of virgin wetlands which had formerly been tentatively designated for use as landfill sites. Further actions of a similar nature are contemplated, thus reducing the estimates of the potential lifespans of such existing facilities.
>
> • • •
>
> "Our Appellate Division has recognized that garbage and refuse may provide a direct threat to the public health. *Shaw* v. *Byram Township*, 86 N.J. Super. 598, 602, 207 A.2d 570 (App. Div.), *certif. denied*, 45 N.J. 35, 210 A.2d 780 (1965) and indeed the point is self-evident. Likewise, the detrimental effects which sanitary landfills have upon the environment have been acknowledged:
>
> "• • • Sanitary landfills conducted on virgin land forever ruin the possibility of preserving the site for conservation. Additionally, such landfill operations can have an adverse effect on the ecological balance of the surrounding area. A sanitary landfill operation also has *severe limiting effects on future development of the property*. Problems of settlement, gas generation, and fires make it difficult to construct structures on former landfill sites.'" (App. 33, 35, 46-47).

These findings must of course be accepted on appeal to the Court unless they lack a reasonable basis in the evidence. *Evco v. Jones*, 409 U.S. 91, 94 (1972).

The New Jersey Legislature responded to this solid waste crisis by enacting chapter 363, the operative section of which provides:

> "No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State" (App. 70-71).

Pursuant to his statutory responsibilities under chapter 363, the Commissioner of the New Jersey Department of Environmental Protection adopted rules and regulations, to become effective concurrently with the statute, which provided:

"(a) No person shall bring into this State, or accept for disposal in this State, any solid or liquid waste which originated or was collected outside the territorial limits of this State. This Section shall not apply to:

1. Garbage to be fed to swine in the State of New Jersey;

2. Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

3. Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 per cent of the thru-put of any such facility is to be separated or processed into usable secondary materials; and

4. Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State." N.J.A.C. 7:1-4.2 (App. 76).

The combined effect of chapter 363 and the implementing regulation is to prohibit the transportation into New Jersey of waste for dumping in landfills or burning in incinerators, while permitting interstate transportation of waste intended for any productive use, such as resource recovery, energy recovery or reclamation.

The Supreme Court of New Jersey concluded that this limited restriction on the dumping or incineration of waste,

as an emergency measure to cope with the State's solid waste crisis, was not incompatible with the principles of economic union embodied in the Commerce Clause. It said:

> "We recognize, and now emphasize, that the objectives of the statutes and regulations in question are not only to preserve the health of New Jersey residents by keeping their exposure to solid waste and landfill areas to a minimum, but also to preserve for the benefit of both present and future generations the natural habitat and ecological values which landfill usage would destroy. The Supreme Court has recognized that the protection of public health through the preservation of the environment is a valid, and indeed primary, objective of the police power. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442, 80 S. Ct. 813, 815, 4 L.Ed.2d 852, 855 (1960). Today it cannot possibly be questioned that the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this power" (App. 47).

These conclusions are fully consistent with the leading Commerce Clause decisions of the Court.

The Commerce Clause of Art. 1, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." It is now well established that it not only provides an affirmative grant of authority to Congress but also, even in the absence of congressional action, precludes the states from interfering with interstate commerce. It is equally well established, however, that the Commerce Clause does not require the states to permit the importation of articles which are an inherent threat to

public health, safety and welfare and thus a matter of special concern in the exercise of the states' police powers. *Clason v. State of Indiana*, 306 U.S. 439, 442-443 (1939); *Sligh v. Kirkwood*, 237 U.S. 52 (1915). As the Court stated in *Sligh v. Kirkwood, supra:*

> "The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution. '*Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution.*'"
>
> "*Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state . . .*" 237 U.S. at 60 (citations omitted) (Emphasis added.)

This principle was applied in *Clason v. Indiana, supra*, where the Court upheld an Indiana statute which in effect prohibited the interstate transportation of animal carcasses not slaughtered for food. The Court, relying on *Sligh*, recognized that the statute was "a sanitary and health measure *not intended to cause discrimination against or to burden interstate commerce* . . ." 306 U.S. at 443 (emphasis added). The Court clearly stated:

> "Here, contrary to what seems to be the insistence of counsel, *the State has not recognized dead horses as legitimate articles of intrastate commerce. It permits them to be sold only to licensed operators who must transport them immediately under strict sanitary regulations for prompt delivery to a licensed plant there to be rendered innocuous without delay by prescribed methods. All this is part of a workable scheme to secure prompt removal of decaying carcasses and thus protect against obvious evils.*
>
> "We can find no substantial basis for the charge of discrimination against legitimate interstate commerce. That any real burden upon commerce which the State is not free to inhibit will result from the challenged statute seems impossible.
>
> "There is no suggestion of conflict with a federal enactment. The mere power of the Federal Government to regulate interstate commerce does not disable the State from adopting reasonable measures designed to secure the health and comfort of their people. The statute under consideration is an effort to discharge an obligation to the public; the means adopted we think are clearly appropriate to this lawful end." *Id.* at 443-4 (Emphasis added).

The Commerce Clause thus does not impair state authority to deal with threats to public health, safety and welfare. Rather, the intent of the Commerce Clause was to prevent economic balkanization of the states, such as by the enactment of legislation designed to further the economic interests of a state's own residents at the expense of others. This point was cogently stated by Justice Jackson in *Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949):

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

Measured by these principles, it is clear that chapter 363 does not offend the Commerce Clause because it is properly designed to protect the public health, safety and welfare of the residents of this State rather than to serve any local economic advantage. It is clear, as indicated in the opinion of the Supreme Court of New Jersey, that there is an acute shortage of available landfill space within New Jersey. This means that New Jersey faces the threat of not being able to dispose of the wastes generated within its own boundaries unless it can find new areas for disposal. It is also clear that the disposal of waste does present a serious threat to public health, safety and welfare. It pollutes water by the runoff of leachate, it generates gases which not only can be dangerous to breathe but also create fire hazards, and it severely limits the potential future use of property on which landfills are located. Finally, it is clear that New Jersey's solid waste problems, serious in any event, have been significantly aggravated by the disposal at New Jersey landfill sites of waste from outside the state. The record before the Court shows that when this case was first before the Supreme Court of New Jersey 8% of all waste disposed in New Jersey originated out of state (App. 35) and this percentage has grown to 20% during the pendency of the litigation. Thus, chapter 363 serves a clear public health, safety and welfare interest by reducing the overall quantity of waste which the State must dispose or incinerate,

and it is as fully compatible with the Commerce Clause as was the exclusion in *Clason* v. *Indiana* of animal carcasses not intended for consumption as food.

It is also clear that there is no element of economic discrimination in the exclusion from New Jersey of waste originating out of state. No New Jersey commercial interests stand to gain an advantage from this ban over competitors from outside the state. On the contrary, among the appellants are New Jersey landfill operators. The complaint is not that New Jersey has forged an economic preference for its own commercial interests but rather that, in order to protect the health, safety and welfare of the citizenry at large, it has denied a small group of its entrepeneurs an economic opportunity to traffic in waste.

The appellants rely on the "natural resource" cases to support their attack upon chapter 363. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). However, these cases all dealt with statutes which attempted, as described in *Pennsylvania v. West Virginia*, "to regulate the interstate business to the advantage of the local customers." 262 U.S. at 597-598. Therefore, these cases involved, under the analysis contained in *Hood & Sons v. DuMond*, *supra*, state regulation ". . . to constrict the flow of . . . commerce for their economic advantage . . .", not an attempt by the State ". . . to shelter its people from menaces to their health or safety. . . ." 336 U.S. at 533. The restrictions were therefore naturally found to offend the Commerce Clause.

In short, Commerce Clause cases are concerned with the loss of products or resources to the chain of commerce. This is true whether the product or resource is avocados, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), butter, *Cloverleaf Butter Co. v. Patterson*, 315

U.S. 148 (1942), milk, *Hood & Sons v. DuMond, supra,* raisins, *Parker v. Brown,* 317 U.S. 341 (1942), or natural gas, *Pennsylvania v. West Virginia, supra.* In the present case, on the other hand, chapter 363 was not designed nor does it have the effect of furthering New Jersey commercial interests. Rather, its objective was to protect the citizens of the State from the direct threats to the public health and the environment noted by the Supreme Court of New Jersey.

In arguing that this case is not controlled by the decisions of the Court holding that the Commerce Clause is not violated by state legislation directed towards the protection of the State's health, safety and welfare, the appellants now urge, notwithstanding the record which was before the Supreme Court of New Jersey, that the disposal of waste really involves no threat to the health or welfare of New Jersey's residents. However, appellants presented no substantial material to the state courts to cast any doubt on the prevailing view that landfills do present serious health and environmental problems. In fact, the only material on this subject submitted to the trial court on the cross motions for summary judgment was a lengthy document entitled, "Basis and Background for the Proposed Rules of the Bureau of Solid Waste Management." This report stated *inter alia:*

> "Recent studies indicate that sanitary landfills have environmental problems all their own. We have learned that keeping a landfill truly 'sanitary' involves much more than daily soil cover and the use of massive machinery, although these by no means are unimportant. In New Jersey virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes our ground and surface waters. The natural decomposition process which occurs in sanitary landfills generates a mixture of gases. Much of this mixture is composed of methane, the same 'natural' gas used in cooking and heating." (Pa37).

After discussing in greater detail the environmental and health problems in solid waste disposal, the document concludes with a two-page bibliography of pertinent literature dealing with solid waste problems (Pa47 to Pa48). There was therefore an abundance of material before the Supreme Court of New Jersey dealing with the environmental and health problems posed by waste disposal, on which it appropriately relied in its opinion.

Apparently recognizing that the record simply does not support their claim that this case falls outside the *Clason v. Indiana* line of cases, appellants also argue that the Supreme Court of New Jersey somehow thwarted their efforts to develop a full record and thereby denied the appellants due process of law. This contention is frivolous. It was appellants' trial strategy which determined the course of proceedings in the state courts. Soon after the filing of their complaint, the appellants moved for summary judgment " . . . only upon the issues of federal pre-emption and discrimination against interstate commerce . . . " (App. 134). Thus the essential thesis upon which the matter was submitted to the trial court was that, regardless of the impact on environmental degradation, if New Jersey permitted the dumping in landfills of waste originating within the state, it was also obligated by the Commerce Clause to accept out-of-state garbage for dumping in its landfills. On appeal, appellants again essentially relied upon the thesis that chapter 363 violated the Commerce Clause by "discriminating" against waste originating out of state. No serious ques-

tion was raised as to the validity of legislative findings that environmental degradation was being aggravated by the dumping in New Jersey of wastes originating out of state. However, the Supreme Court of New Jersey rejected the appellants' thesis, finding that ". . . the purpose of the legislation is to protect the inhabitants and vital resources of New Jersey, not to impose economic barriers or create commercial restrictions . . ." (App. 50), and it therefore rejected appellants' claim that chapter 363 was inconsistent with the Commerce Clause. It was then for the first time on a motion for remand to the trial court that appellants raised questions concerning the findings of the New Jersey Legislature and the Supreme Court of New Jersey as to the deleterious impact on the environment of the dumping of out-of-state wastes in New Jersey (App. 149-151). The Supreme Court of New Jersey, over the strenuous objections of the State, granted this motion for remand to the trial court ". . . for such further proceedings, if any, that that court may deem appropriate . . ." (App. 154). Therefore, assuming that any facts remained to be heard, which the State denied, the appellants were given an opportunity to develop those facts. However, the appellants deliberately elected not to proceed before the trial court and instead to enter into a consent dismissal with prejudice. It is therefore surprising, to say the least, to find appellants claiming that this disposition by the state courts denied them due process of law. Appellants' explanation for this strange procedural posture is to say that they needed an injunction against the effectiveness of chapter 363 and, since the Supreme Court of New Jersey had foreclosed the grant of that relief in the state system, it was not in their strategic best interests to continue with state court proceedings. However, appellants' strategic situation did not differ from that of any other party who has been

denied preliminary injunctive relief by a state court, since the right of appeal from the state courts to the Supreme Court of the United States is limited to final judgments under 28 U.S.C. §1257(2). Therefore, if there were any substance to appellants' argument, 28 U.S.C. 1257(2), to the extent it permits appeals to the Supreme Court of the United States only from final judgments, would be subject to attack on due process grounds. The appellants' due process argument is therefore plainly frivolous.

Finally, it should be noted that if any appellant landfill operator really were in a position to establish that it could conduct a disposal operation for waste originating out of state without threat to the health, safety and welfare of New Jersey citizens, it could obtain a further exemption from the prohibitory impact of chapter 363. The statute confers broad power upon the Commissioner of Environmental Protection to permit waste originating out of state to be brought into the State where he determines that this can be done ". . . without endangering the public health, safety and welfare . . ." (App. 62). If any party were able to show that any exemptions from the prohibition against dumping waste originating out of state could be adopted ". . . without endangering the public health, safety and welfare . . .", it must be presumed that the Commissioner would extend the scope of the existing exemptions. However, in the procedural posture in which appellants have placed this matter before the Court, it must be assumed, as has been found by the New Jersey Legislature and the Supreme Court of New Jersey, ". . . that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside of the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all

wastes generated outside of the State be prohibited." N.J.S.A. 13:1I-9. Accordingly, the court properly found chapter 363 to be consistent with the Commerce Clause.

B. *The Federal Resource Conservation And Recovery Act of 1976 Does Not Pre-Empt State Legislation Prohibiting The Disposal Within Its Boundaries Of Waste Originating Out Of State.*

It is now well established that an intent to pre-empt state legislation should not be inferred unless there is "an unambiguous congressional mandate to that effect." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 147 (1963). The Court has been particularly reluctant to find an intent to pre-empt state legislation which has been enacted to serve environmental interests (*Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960)); or to protect public health. *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Reid v. Colorado*, 187 U.S. 137, 147-149 (1902). Therefore, the plaintiffs must bear the heavy burden of demonstrating an unambiguous congressional mandate that the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901, *et seq.*, (hereinafter "the Act") pre-empts New Jersey's statute prohibiting the disposal of waste originating out of state.

The plaintiffs have failed to satisfy that burden, because they have not shown that the Act on its face in any way undermines the validity of New Jersey's prohibition against the disposal within the State of waste originating out of state. On the contrary, the only sense in which the Act bears on this case is that it contains express congressional recognition of the principal premises on which defense of the validity of the New Jersey statute rests.

First, the Act contains an express congressional recognition of the fact that solid waste disposal is not a subject of ordinary commercial dealings controlled by the free market principles of the Commerce Clause but rather a subject which directly affects the environment and public health. Thus, section 1002(b) (42 U.S.C. §6901(b)) states that:

> "ENVIRONMENT AND HEALTH.—The Congress finds with respect to the environment and health, that—
>
> "(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;
>
> "(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;
>
> "(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;
>
> "(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

"(5) hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and

"(6) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken; . . . ."

Secondly, the Act constitutes an express congressional recognition that the problems of solid waste disposal are primarily of state and local, not national, concern. Thus, section 1002(a)(4) (42 U.S.C. §6901(a)(4)) states that ". . . the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies . . . ." This point is underscored by the comments during deliberations on the bill on the floor of the Senate. The co-sponsor of the bill, Senator Randolph, stated:

"In developing this legislation, the members of the Committee on Public Works recognized that solid waste is a uniquely local problem and that programs in this area should be developed and managed at the local government level." 122 Cong. Rec. 11069 (remarks of Senator Randolph).

The one area in which the Act has imposed a direct regulatory responsibility upon the federal government is with respect to hazardous waste. The Administrator of EPA has the responsibility under section 3001 (42 U.S.C. §6921) for identifying the characteristics of hazardous waste and listing particular hazardous wastes not later than eighteen months after enactment of the Act. The

Administrator is required within the same period to promulgate regulations governing the generation, storage, transportation and disposal of hazardous waste. Section 3002-3005 (42 U.S.C. §6922-6925).

Although the exact parameters of the eventual federal regulation of hazardous waste are difficult to predict at this time, it is clear that the assumption of federal regulatory control over the subject has no immediate impact upon New Jersey's prohibition against the disposal of waste originating out-of-state and only a limited potential long range impact. First, these sections of the Act are not self-implementing but rather are dependent upon the promulgation by the Administrator of EPA of a list of hazardous wastes and of regulations governing their generation, storage, transportation and disposal. Since the Administrator has eighteen months within which to promulgate such lists and regulations, the federal regulation of this area probably will not become operative at all for at least six months. It is firmly established that such potential future regulation of a subject matter by a federal agency does not pre-empt present regulation by the states. *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714, 723-724 (1963); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939).

Secondly, and even more importantly, when the federal regulatory program becomes operative, it will be limited to "hazardous wastes." This term is generally understood in the field of solid waste management to apply solely to industrial wastes which are inherently dangerous to plant and animal life. The Senate Committee on Public Works noted in its report on the Act that "[m]aterials of major concern are arsenic wastes, insecticide and pesticide residues, waste oil, explosive wastes, sludge contaminated with metals such as chromium and zinc, and

radioactive wastes." S. Rep. No. 94-988, 94th Cong., 2d Sess. 3 (1976). In the Act, "hazardous waste" is defined as:

> ". . . a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may—
>
> "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> "(B) pose a substantial present or potential hazard to human health or the environment when improperly treated stored, transported, or disposed of, or otherwise managed." Section 1004(5) (42 U.S.C. §6903(5)).

It seems clear that ordinary household and commercial waste, or garbage, would not fall within these criteria for defining "hazardous waste" and thus would not be subject to federal regulation under section 3001-3011 (42 U.S.C. §6921-§6931) of the Act. This conclusion is confirmed by the Report of the Senate Committee on Public Works on the Act which expressly states that the permit system for hazardous wastes ". . . is not to be used to control the disposal of hazardous substances used in households or to extend control over general municipal wastes based on the presence of such substances." S. Rep. No. 94-988, 94th Cong., 2d Sess., 16 (1976). Since the New Jersey statute as limited by its implementing regulations is primarily directed towards general municipal waste and the plaintiffs apparently are engaged solely in the disposal of such waste, the federal regulation of "hazardous waste" would have no effect on the subject matter of the instant appeal.

In addition to providing for direct federal regulation of "hazardous waste," the Act also establishes a system of incentives for regional planning with respect to the reclamation or disposal of other solid wastes. Although the exact future scope of federally supervised regional solid waste planning by state and local agencies, like the direct federal regulation of hazardous wastes, cannot be forecast with any assurance, it clearly has no immediate impact upon the New Jersey prohibition against the disposal of waste originating out of state. The regional planning provisions of the Act are not self-implementing but rather will become operative only after administrative action at both federal and state levels. The Administrator of EPA has 180 days after enactment of the Act to publish guidelines for identifying regional solid waste planning areas, and thereafter the governors of the states have two further 180 day periods for identifying the boundaries of regional planning areas and the agencies to carry out such planning; there is thus an overall period of nearly eighteen months before regional planning areas and implementing agencies even will be identified. Although the Act sets no deadline for the actual submission of regional plans, it must be assumed that some additional period will be required for this purpose beyond the eighteen months allowed for identifying planning regions and implementing agencies. Thus, since it will be several years before regional plans under the Act become operative, these sections of the Act can have no immediate impact upon the enforcement of chapter 363.

Furthermore, there is no substantial basis for concluding that chapter 363 will be incompatible with the solid waste planning provisions of the Act even when they become fully operational. First, it should be noted that the only way there could be a conflict between the

New Jersey statute and a regional plan under the Act is if the plans of New Jersey and its neighboring states include "interstate regions" pursuant to section 4006(c) (42 U.S.C. §6946(c)). Therefore, it is purely conjectural at this point whether the occasion will arise even for discussions for interstate regional planning areas. And, as previously noted, the mere possibility of conflicting regulatory action by a federal agency at some future date does not invalidate state legislation. *Colorado Anti-Discrimination Commission v. Continental Air Lines, supra; H. P. Welch Co. v. New Hampshire, supra.*

Secondly, it is clear that the planning provisions of the Act are intended to be voluntary, with the loss of federal financial assistance being the only consequence of a state's failure to participate in the federal program. The voluntary nature of the planning provisions of the Act is clearly evident in the specific section of the Act dealing with "interstate" regions, which specifically states that the establishment of such "interstate" regions shall be by "agreement" of the respective governors. Furthermore, there is no provision in the Act for the Administrator imposing an interstate plan in the event the governors fail to agree. Therefore, the sole possible consequence of the governors' failing to come to an agreement would be the loss of federal financial assistance in accordance with the terms of section 4007 (42 U.S.C. §6947(b)) of the Act.

The intent of Congress to make regional planning voluntary is confirmed by the numerous statements in the legislative history that ". . . States and areawide solid waste management planning agencies have free choice in selecting the elements of their solid waste management plans." S. Rep. No. 94-988, 94th Cong., 2d Sess., 11 (1976). This point is stated with particular clarity in the Report of the House Commerce Committee:

"It is the Committee's intention that federal assistance should be an incentive for state and local authorities to act to solve the discarded materials problem. At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative.

"Simply, the discarded materials problem is one of planning and the Committee anticipates that federal guidelines for planning will foster the necessary cooperation between the federal government, states, and local regions, to meet very broad and flexible objectives of this act. If those objectives are not met, the states and local authorities within the states will lose the federal or technical assistance. However, the provisions of this legislation, specifically do not authorize the federal government to take over the responsibility for discarded materials disposal planning." H. Rep. No. 94-1491, at 33.

Therefore, even if the guidelines promulgated by the Administrator under section 4002(a) (42 U.S.C. §6942(a)) suggested the appropriateness of an interstate region encompassing New Jersey, the Governor of New Jersey still would have the option whether to agree to such a plan.

In any event, even if the Act could be read to impose a mandatory obligation upon the respective states to participate in regional planning, chapter 363 would not stand as an obstacle to compliance with that provision. Chapter 363 does not by its terms preclude the Governor of New Jersey from conferring with the governor of a sister state regarding regional solid waste planning. And if the procedures of the Act eventually were to result in an agreement between the governors of the respective states which was inconsistent with a total ban on the disposal in New

Jersey of out-of-state waste, this could be easily implemented through a further exercise by the Commissioner of Environmental Protection of his power to adopt exceptions from the total ban where that can be done ". . . without endangering the public health, safety and welfare. . . ." *N.J.S.A.* 13:1I-10.

Therefore, as also concluded by the Solicitor General of the United States in his Memorandum on the Application for Stay of Judgment Pending Appeal, the enactment of the Resource Conservation and Recovery Act of 1976 does not pre-empt or in any way undercut the validity of the New Jersey legislation prohibiting the disposal of waste originating out of state. Rather, it reflects congressional concurrence with the view that the disposal of waste does not involve the national interest in maintenance of an open economy, but instead the discharge by government under the police power of a fundamental responsibility to provide for the disposal of waste generated by its inhabitants with the least possible adverse impact upon health, the environment and land use.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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